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No. 97-1562

In The

Supreme Court of the United States

October Term, 1997

CORNELIA WHITNER,

Petitioner,

vs.

THE STATE OF SOUTH CAROLINA,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of South Carolina

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR *CERTIORARI* AND BRIEF IN SUPPORT OF THE PETITION FOR *CERTIORARI* OF THE NATIONAL ASSOCIATION OF ALCOHOLISM AND DRUG ABUSE COUNSELORS, SOUTH CAROLINA ASSOCIATION OF ALCOHOLISM AND DRUG ABUSE COUNSELORS, AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, NATIONAL ASSOCIATION OF SOCIAL WORKERS, INC., AMERICAN NURSES ASSOCIATION, SOUTH CAROLINA NURSES ASSOCIATION, AMERICAN MEDICAL WOMEN'S ASSOCIATION, NATIONAL ASSOCIATION FOR FAMILIES AND ADDICTION RESEARCH AND EDUCATION, ASSOCIATION FOR MEDICAL EDUCATION AND RESEARCH IN SUBSTANCE ABUSE, AMERICAN ACADEMY ON PHYSICIAN AND PATIENT, SOCIETY OF GENERAL INTERNAL MEDICINE, NATIONAL COUNCIL ON ALCOHOLISM AND DRUG DEPENDENCE, INC., NATIONAL CENTER FOR YOUTH LAW, LEGAL SERVICES FOR PRISONERS WITH CHILDREN, COALITION ON ADDICTION, PREGNANCY AND PARENTING, NOW LEGAL DEFENSE AND EDUCATION FUND, LEGAL ACTION CENTER, WOMEN'S LAW PROJECT, DRUG POLICY FOUNDATION, AND ALLIANCE FOR SOUTH CAROLINA'S CHILDREN

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR *CERTIORARI*

Pursuant to Sup. Ct. Rule 37.2(b), the above organizations ("*amici*") move for leave to file the attached brief *amici curiae* in support of the Petition for *Certiorari*.

If left to stand, the ruling in *Whitner v. South Carolina*, 492 S.E. 2d 777 (S.C. 1997) would require for the first time in the nation that physicians, health care providers, and social services workers (among others), under threat of criminal penalties, divulge to state authorities, for possible prosecution, the identities and medical information of pregnant women who engage in conduct or activities that may "adversely affect[ ]" the health or welfare of their fetuses. S.C. Code § 20-7-510(A). Because any number of acts or omissions on the part of a pregnant woman could have an adverse impact on fetal development, the decision below imposes a duty of unknowable dimensions and sweeping breadth on all health and social services providers who serve pregnant women. Moreover, *Whitner* places physicians and other health professionals, who regard confidentiality as an essential part of patient care in an untenable ethical bind: either risk jail by upholding the confidentiality that is an essential part of medical care and is particularly critical for effective treatment, or disclose clients' identities in compliance with state reporting requirements, possibly imperiling the health and well-being of pregnant women and their fetuses. The intent of the *amici* is to bring to the Court's attention the troubling consequences of the *Whitner* decision for the medical and social services professionals of South Carolina.

This motion is necessary because Respondent State of South Carolina has declined to consent to the filing of proposed *amici*'s brief.

INTEREST OF THE *AMICI CURIAE*

As the names of the *amici* organizations suggest, and the descriptions of these organizations in the attached brief underscore, *amici* comprise a broad array of South Carolina and national medical, social services, legal services, and substance abuse treatment organizations, with memberships that range from direct service providers to researchers, academics, and theorists. What unites these organizations is a dual recognition that substance abuse is a treatable disease but that the South Carolina Supreme Court's decision in *Whitner* threatens to stymie the delivery of effective treatment to some of the most vulnerable patients in the community.

Amici share at least three basic, interrelated interests in this case. First, *amici*, many of whom provide prenatal and substance abuse treatment to pregnant women, are interested in this litigation because of the confusion, dangers, and conflicts that all medical and social services professionals who serve pregnant women in South Carolina face in the wake of the *Whitner* decision.

Second, *amici* physicians and medical providers are interested in this litigation because the state supreme court, by re-writing South Carolina's reporting law to include fetal abuse, strikes at the core of the physician-patient bond, undermining the trust and confidence essential to the critical relationship between health care professionals and their pregnant patients. To compromise the doctor-patient relationship is to compromise care. The result will be damaged health, increased suffering, escalating health care costs, and decreased life expectancy.

Third, *amici* are concerned that the decision below will deter pregnant women from obtaining adequate prenatal care, including substance abuse treatment. As *amicus curiae* South Carolina Association of Alcoholism and Drug Abuse Counselors ("SCAADAC") notes, in the wake of the highly publicized decision below, at least two alcohol and drug treatment programs in the Columbia, South Carolina, area have experienced precipitous drops in the number of pregnant women seeking admission. *Amici*, individually and as a

whole, have professional and ethical interests in promoting women's and children's health, and therefore in preventing this effect, and wish to apprize this Court of the tragic health implications of the state supreme court decision for pregnant women and their children.

Respectfully submitted,

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I.

INTERESTS OF THE *AMICI CURIAE*

Amici seek to shed light upon the confusion, dangers and conflicts that all medical and social service professionals who serve pregnant women in South Carolina face in the wake of *Whitner v. South Carolina*, 492 S.E.2d 777 (S.C. 1997).[1] The unprecedented expansion of the state's child neglect and abuse laws subjects health care and social service professionals to criminal sanctions for failing to divulge the identities and medical histories of some of their most medically vulnerable and needy clients to state authorities for possible prosecution. At the same time, persons bound by the state's reporting statute lack any guidance as to which pregnant clients they must report. Because of the intolerable legal risks and ethical dilemmas created by *Whitner*, this Court should grant *certiorari* in this case.

Amicus Curiae National Association of Alcoholism and Drug Abuse Counselors ("NAADAC") is the nation's largest organization of alcohol and drug counselors, with 17,000 members. NAADAC's members have special expertise in the substance abuse treatment needs of pregnant women. NAADAC joins this brief because it is deeply concerned that the decision below, if permitted to stand, will undermine the quality of care that South Carolina substance abuse professionals can provide pregnant patients, and will deter pregnant women from seeking these essential services.

Amicus Curiae South Carolina Association of Alcoholism and Drug Abuse Counselors ("SCAADAC") is the South Carolina state affiliate of NAADAC. Its 495 members work as alcohol and drug counselors throughout the state in both the public and private sectors. Like NAADAC, SCAADAC is troubled by the serious legal and ethical dilemmas facing its membership in the wake of *Whitner*. SCAADAC is also in a

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[1] Petitioners consent to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amici Curiae*, their members, or their counsel made a monetary contribution to the preparation and submission of this brief.

position to document some of the consequences of the *Whitner* decision. After the highly publicized prosecution of Cornelia Whitner and the South Carolina Supreme Court's decision upholding her conviction and sentence, on July 15, 1996, at least two programs in the Columbia, South Carolina, area that give priority to pregnant women have already reported precipitous drops in admissions for pregnant women. The records of the Women's Community Residence, a halfway house for women substance abusers, show that admissions of pregnant women fell 80% (from 10% to 2% of the total number of women treated at the facility) between July 1, 1996 and June 30, 1997. At the Women's Intensive Outpatient program, an intensive day program which provides child care, admissions of pregnant women declined 54% (from 13% to 6% of the total number of women treated at the facility) during roughly the same period. In light of these and other observations, SCAADAC is deeply concerned that pregnant women who require alcohol and/or drug treatment are being deterred from seeking treatment for fear of prosecution.

Amici Curiae American College of Obstetricians and Gynecologists, American Nurses Association, South Carolina Nurses Association, and American Medical Women's Association are associations of medical professionals knowledgeable about the health care needs of pregnant and parenting women. They join this brief out of their concern that the health and well-being of women and their children will be grievously harmed by the decision below.[2]

II.

INTRODUCTION

In declaring a viable fetus to be a "child" within the meaning of the state Children's Code, the South Carolina Supreme Court's decision below imposes upon physicians,

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[2] Further statements of interest are set forth in the Appendix to this brief.

substance abuse treatment providers, and social service professionals a heretofore unimaginable duty: to divulge to state authorities, for possible prosecution, the identities and medical information of pregnant women who engage in conduct or activities that may "adversely affect[ ]" the health or welfare of the fetus. S.C. Code § 20-7-510. Professionals who fail to disclose such information now themselves face criminal fines and imprisonment under state law. *See* S.C. Code § 20-7-560. Yet, the ruling below imposes a duty of unknowable dimensions and sweeping breadth on all health and social services providers who serve pregnant women. The unprecedented and altogether vague nature of the *Whitner* decision is causing significant confusion and fear among medical and social services professionals who must now divine what actions or omissions of pregnant women might trigger the statutory reporting requirement.

The *Whitner* decision further creates an intolerable dilemma for physicians and health care providers: either risk jail by upholding the confidentiality that is an essential part of medical care and is particularly critical for effective treatment, or disclose clients' identities in compliance with state reporting requirements, possibly imperiling the health and well-being of pregnant women and their fetuses.

The *Whitner* decision also has produced real and devastating consequences for pregnant women, many of whom are now avoiding prenatal care and drug and alcohol treatment for fear that confiding their health problems to their physicians or counselors could lead to their arrest and imprisonment. If let stand, the decision below will seriously compromise the ethical practice of medicine, cause irreparable harm to patients, and severely impair the provision of vital health and social services.

Lastly, the criminal penalties that *Whitner* foists upon treatment providers and their pregnant patients fly in the face of the longstanding recognition, in this Court as well as in the medical community, that addiction is a disease, not a crime. *See Linder v. United States*, 268 U.S. 5, 18 (1925) (Addicted persons "are diseased and proper subjects for [medical] treatment."). *Cf. Robinson v. California*, 370 U.S. 660 (1962)

(holding unconstitutional a state law making narcotic addiction a crime). For all of these reasons, the Court should grant the petition for *certiorari* in this case.

III.

REASONS FOR GRANTING THE PETITION

A. THE PETITION SHOULD BE GRANTED BECAUSE OF ITS EXCEPTIONAL IMPORTANCE TO MEDICAL AND SOCIAL SERVICES PROVIDERS WHO SERVE PREGNANT PATIENTS.

In expanding the state's child neglect law to reach the conduct of pregnant women, the South Carolina Supreme Court in *Whitner* imposes a vague and sweeping mandatory reporting requirement upon health care and social services providers. The reporting statute provides in relevant part:

> A physician, nurse, dentist, optometrist, medical examiner or . . . any other medical, emergency medical services, mental health, or allied health professional or . . . school teacher, counselor, principal, assistant principal, social or public assistance worker, substance abuse treatment staff, or child care worker in any day care center or foster care facility, police or law enforcement officer . . . or persons responsible for processing of films or any judge *shall report* in accordance with this section *when in the person's professional capacity the person has received information which gives the person reason to believe that a child's physical or mental health or welfare has been or may be adversely affected by abuse or neglect.*

S.C. Code § 20-7-510 (A) (emphases added); *see Whitner*, 492 S.E.2d at 782 (upholding defendant's child abuse conviction upon finding that the use of cocaine during pregnancy "can cause serious harm to the viable unborn child"). A health care professional's knowing failure to report a case of child abuse or neglect constitutes a misdemeanor punishable by fine and/or imprisonment of up to six months. S.C. Code § 20-7-560.

The *Whitner* decision radically expands the concept of child abuse, requiring health and social services professionals to report an ill-defined yet vast array of conduct that might damage a fetus. This standardless extension of child abuse law has caused substantial confusion and fear within the medical community. South Carolina practitioners must now divine, upon threat of imprisonment, what conduct by a pregnant woman may adversely affect her fetus's "physical or mental health or welfare," S.C. Code § 20-7-510 (A), and must report all women with viable pregnancies engaging in such conduct who seek their professional services to state authorities for possible prosecution. No proof of harm to the child is required under § 20-7-510. The reporting requirement apparently applies wherever a child (or, under *Whitner*, a fetus) "is likely to be endangered." The state supreme court determined that a woman's ingestion of cocaine during the third trimester of pregnancy is likely to have fetotoxic effects. That determination is the subject of scientific dispute, yet in South Carolina it is "true" as a matter of law. *See infra*, notes 3-7, and accompanying text. Indeed, the record contains no evidence that the children of both petitioners, Cornelia Whitner and Malissa Ann Crawley, are unhealthy in any way. Nonetheless, health care providers and social services professionals are now obligated to report a pregnant woman where there is merely "reason to believe" the woman engaged in any conduct that may adversely affect the health of the viable fetus. To be sure, under *Whitner*, the statute's reporting requirements are by no means limited to the use of illicit substances such as cocaine. As the court made clear, § 20-7-510 covers any action "likely to endanger the child without regard to whether the action is illegal in itself." *Whitner*, 492 S.E.2d at 781-82.

As the dissenting justices of the South Carolina Supreme Court and the rulings of every state court to have addressed this issue have observed, the enlargement of child abuse statutes to reach maternal conduct that may endanger a fetus leads to absurd, unintended, and dangerous results: health and social services professionals, among others, must guess whether, for example, a pregnant woman's failure to obtain

prenatal care, to quit smoking or drinking, to stop taking over-the-counter medicine, or to refrain from playing rigorous sports constitutes unlawful behavior. *See id.* at 788 (Moore, J., dissenting); *Nevada v. Encoe*, 885 P.2d 596, 598 (Nev. 1994) (per curiam); *Commonwealth v. Welch*, 864 S.W.2d 280, 283 (Ky. 1993); *Reinesto v. Arizona*, 894 P.2d 733, 736-37 (Ariz. Ct. App. 1995).

For the medical community, these scenarios are not mere idle speculation. Indeed, from the perspective of health professionals who are guided by science and hard data, the *Whitner* decision portends an infinite variety of circumstances that could be interpreted as triggering the state's reporting requirement. The South Carolina Supreme Court establishes as an irrefutable fact that a pregnant woman's ingestion of any measurable amount of cocaine constitutes child abuse. By necessary implication, fetal exposure to any other substance for which scientific data shows an equivalent or greater degree of risk must likewise be deemed child abuse. This is troubling for the simple reason that, notwithstanding the South Carolina Supreme Court's statement to the contrary, "[k]nowledge concerning the biological effects of cocaine exposure on the newborn is inconclusive at present."[3] In contrast to the evidence relied upon in *Whitner*, a number of studies have found *no* detectable increase in the rate or severity of birth defects associated with cocaine use during pregnancy.[4] Although the

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[3] E. Hutchins, *Drug Use During Pregnancy*, 27 J. of Drug Issues 463, 465 (1997).

[4] *See* A.J. Tuboku-Metzger *et al., Cardiovascular Effects of Cocaine in Neonates Exposed Prenatally*, 13 American J. of Perinatology 1 (1996) (study of chronic cocaine use among pregnant subjects finding no direct effects on the health or development of newborns); B.B. Little *et al., Is There a Cocaine Syndrome? Dysmorphic and Anthropometric Assessment of Infants Exposed to Cocaine*, 54 Teratology 145 (1996) (finding no recognizable constellation of dysmorphic features to distinguish between cocaine-exposed and non-exposed infants); N.S. Woods et al., *Cocaine Use During Pregnancy: Maternal Depressive Symptoms and Infant Neurobehavior over the First Month*, 16 Infant Behavior and Dev. 83, 92 (1993) (finding no differences in neurobehavioral performance of cocaine-

popular press of the late 1980s fueled what one scientist called a "mythology of severe risk" of fetal harm from cocaine use during pregnancy, these press accounts rested upon a handful of early studies (now more than a decade old).[5] Some of those studies did not show what the media claimed, and others were methodologically unsound and have subsequently been discredited.[6] As of the present time, there remains genuine

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exposed infants when compared to non-exposed infants); C.D. Coles *et al.*, *Effects of Cocaine and Alcohol Use in Pregnancy on Neonatal Growth and Neurobehavioral Status*, 14 Neurotoxicology and Teratology 23, 31-32 (1992) (finding prenatal cocaine exposure effects fetal growth but that cocaine-exposed infants do not appear otherwise impaired physically or behaviorally in the neonatal period). *See also* L.E. Gomez, *Misconceiving Mothers: Legislators, Prosecutors, and the Politics of Prenatal Drug Exposure* 23-25 (1997) (discussing the failure of longitudinal studies to find statistically significant differences between cocaine-exposed children and non-exposed children).

[5] *See generally* J. Morgan & L. Zimmer, *The Social Pharmacology of Smokeable Cocaine: Not All It's Cracked Up to Be, in Crack in America: Demon Drugs and Social Justice* 149-54 (C. Reinarman & H.G. Levine eds. 1997) (virtually all adverse outcomes found in fetal studies involving cocaine were reported in the mass media as evidence that crack *causes* damage in babies even though no study has convincingly shown that to be so); Gomez, *supra* note 4, at 11-26 (same).

[6] The studies examining the effects of prenatal cocaine exposure on newborns and infants – particularly the early studies that gave rise to the "crack baby" scare – suffer from methodological problems that markedly limit or vitiate their significance. These problems include small sample sizes; failure to control for the effects of confounding variables such as maternal malnutrition, lack of prenatal care, the use of other drugs such as nicotine, alcohol, and prescription medications; and the assignment of women to a study or control group based on either maternal self-reporting of cocaine use or a single urinalysis test. *See* B.M. Lester *et al.*, *Data Base of Studies of Prenatal Cocaine Exposure and Child Outcome*, 27 J. of Drug Issues 487 (1997) (computerized assessment of scientific literature concluding that knowledge about the existence or extent of effects of prenatal cocaine exposure on child outcome is limited, scattered, and compromised by methodological shortcomings); E. Hutchins, *Drug Use During Pregnancy*, 27 J. of Drug Issues 463, 466 (1997).

scientific dispute as to whether a causal link exists between cocaine use and serious fetal harm.[7]

If the controversial evidence in *Whitner* is sufficient to find that prenatal cocaine exposure is a ground for child abuse, then a host of other activities and substances would also appear to trigger the child abuse reporting requirement. There is longstanding scientific consensus that various elicit substances, including alcohol[8] and

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[7] *See* note 4, *supra; see also* C.D. Coles, *Saying "Goodbye" to the "Crack Baby"*, 15 Neurotoxicology and Teratology 290 (1993) ("The hysteria and poorly considered reactions of . . . the public have made the 'crack baby' for years an embarrassing episode."); D.R. Neuspiel, *Cocaine and the Fetus: Mythology of Severe Risk*, 15 Neurotoxicology and Teratology 305 (1993) ("mythology of severe risk" of gestational cocaine exposure persists despite contrary scientific evidence). It should be noted that some researchers have found an increase in genitourinary tract malformations and decreases in birth weights, body length and head circumferences of cocaine-exposed neonates. However, researchers note that the pregnant cocaine users in such studies have clustering of other serious reproductive risk factors – notably, elevated tobacco and alcohol use – and a lack of prenatal care that "confound" conclusions about cocaine's toxicity. Researchers also observe that these findings do not appear predictive of longer-term physiological, behavioral or cognitive deficits. *See, e.g.*, H. Hurt *et al., Children with In Utero Cocaine Exposure Do Not Differ from Control Subjects on Intelligence Testing*, 151 Arch. Pediatric & Adolescent Med. 1237 (1997); H. Hurt *et al., Play Behavior in Toddlers with In Utero Cocaine Exposure: A Prospective, Masked, Controlled Study*, 17 J. Developmental and Behavioral Pediatrics 373 (1996); D.E. Hutchings, *The Puzzle of Cocaine's Effects Following Maternal Use During Pregnancy: Are There Reconcilable Differences?*, 15 Neurotoxicology and Teratology 281 (1993); G. Koren, *Cocaine and the Human Fetus: The Concept of Teratophilia*, 15 Neurotoxicology and Teratology 301 (1993).

[8] Fetal Alcohol Syndrome is the leading cause of mental retardation in the United States. L.P. Finnegan & S.R. Kandall, *Maternal and Neonatal Effects of Alcohol and Drugs in Substance Abuse, A Comprehensive Textbook* 513, 529 (J.H. Lowinson *et al.* eds., 1997) [hereinafter "*Comprehensive Textbook*"].

tobacco,[9] can cause serious, irreversible harm to the developing fetus. The same is also true of a wide range of commonly prescribed medications. These include psychiatric medications, such as anticonvulsants,[10] Lithium and other mood-

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[9] Low birth weight, sudden infant death syndrome, spontaneous abortion, premature rupture of the membranes, and abnormal placentation are associated with maternal tobacco use. *See, e.g.*, L.C. Castro *et al.*, *Maternal Tobacco Use and Substance Abuse: Reported Prevalence Rates and Associations with the Delivery of Small for Gestational Age Neonates*, 81 Obstetrics and Gynecology 396 (1993); Office on Smoking and Health, *The Health Consequences of Smoking: Nicotine Addiction* 602 (1988). The teratogenic effects of tobacco and alcohol are particularly relevant because women who ingest cocaine during pregnancy are more likely to use tobacco and alcohol than are non cocaine-users. M. Bendersky *et al.*, *Characteristics of Pregnant Substance Abusers in Two Cities in the Northeast*, 22 Am. J. Drug & Alcohol Abuse 349, 353 (1996).

[10] A leading scientific text notes that the teratogenic affects of anticonvulsants were identified in the 1960's, especially those caused by the drug Dilantin, commonly prescribed for epileptics and that "[n]o dose response curve has been demonstrated, nor has a "safe" dose been found below which there is no increased teratogenic risk." K.L. Jones, *Smith's Recognizable Patterns of Human Malformation* 559 (5th ed. 1997) [hereafter "*Smith's Recognizable Patterns of Human Malformation.*"]. Other anticonvulsants associated with facial malformations, mental deficiencies, speech disorders, and cardiovascular defects include trimethadione, valproic acid, and warfarin. *Id.* at 564-69. With respect to trimethadione in particular, it warns that "the frequency and severity of defects associated with maternal use of these drugs during pregnancy are high enough to warrant consideration of early elective termination of pregnancy." *Id.* at 500 (citing G.L. Feldman *et al.*, *The Fetal Trimethadione Syndrome*, 131 Am. J. Dis. Child 1389 (1977)). Another standard medical text notes: "An association of fetal abnormalities with anticonvulsants is strengthened by increasing reports of cleft palate, cardiac abnormalities, craniofacial anomolies, nail and digit hypoplasia, visceral defects, and mental subnormality in children of epileptic mothers taking anticonvulsant drugs." *The Merck Manual of Diagnosis and Therapy* 1859 (R. Berkow ed., 16th ed. 1992) [hereafter "*Merck Manual.*"].

stabilizers,[11] antipsychotics, and benzodiazepines (the class of medications which includes Valium, Librium and Xanax),[12] as well as some antibacterials (especially Tetracyclines),[13] anticoagulants,[14] thyroid medications,[15] and antihypertensive

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[11] "Among psychotropic drugs, lithium has been more strongly associated with congenital anomolies than have other agents. . . . [N]umerous publications indicate an increased incidence of cardiovascular abnormalities, particularly an increase in Ebstein's anomoly in infants born of lithium-treated mothers." J.G. Berstein, *Handbook of Drug Therapy in Psychiatry* 415 (2d ed. 1988) (citing G.E. Robinson *et al., The Rational Use of Psychotropic Drugs in Pregnancy and Postpartum* 31 Can J. Psychiatry 183 (1986)).

[12] *Id.* at 407 ("Lithium presents a significant risk to fetal development if taken during the first trimester. . . . Benzodiazepines and meprobomate have a significant risk of teratogenic effects. . . . "). The specific birth defects (or "anomalies") associated with these and other psychiatric medications taken during pregnancy include: growth retardation and oral clefts (barbiturates); cleft palates, neurologic depression and low Apgar scores (benzodiazepines); "severe anomalies in 12% of newborns" (meprobomate); respiratory distress (antidepressants); chromosomal gaps and breaks, congenital heart anomalies; reduced thyroid function; and external ear malformations (lithium carbonate and the other mood-stabilizing drugs). *Id.* at 407-421 (citing W.S. Barry and S.M. St. Clair, *Exposure to Benzodiazepines in Utero* 1 Lancet 1436 (1987)); M.J. Whittle and K.P. Hanretty, *Prescribing in Pregnancy: Identifying Abnormalities*, 293 Br. Med. J. 1485 (1986).

[13] Tetracycline has been associated with permanent discoloration of the teeth, enamel hypoplasia, and a lowered resistance to caries, as well as retarded bone growth, especially when taken during the latter part of the pregnancy. *Merck Manual* at 41.

[14] Certain anticoagulants, including Warfarin, can cause nasal abnormalities, bone stipling, bilateral optic atrophy, varying degrees of mental retardation, microcephaly, and occasionally fetal and maternal hemorrhage. *Smith's Recognizable Patterns of Human Malformation* at 568.

[15] Some thyroid medications taken during pregnancy can cause severe hypothyroidism, fetal goiter, or scalp defects. *Merck Manual* at 1859.

drugs.[16] Even "[l]arge doses of aspirin may result in delayed onset of labor, premature closure of the fetal ductus arteriosus . . . or neonatal bleeding."[17] Additionally, prenatal exposure to adverse environmental factors such as poor nutrition, substandard housing and a lack of social supports and services (all of which are associated with poverty) can also profoundly affect infant health,[18] as can a childhood spent in the care of adults who suffer from depression or other serious mental illness.[19]

As these examples illustrate, the reporting obligations of South Carolina professionals vis-a-vis pregnant women are potentially limitless and are fraught with uncertainty. At the very least, there now appears to be a strong presumption that health care and social service professionals must report pregnant women who smoke tobacco or drink alcohol. It also is entirely plausible that *Whitner* obligates South Carolina health and social services professionals to report for prosecution *all* pregnant patients who engage in *any* conduct that may adversely affect the health of the fetus, even where the evidence linking the conduct with harmful consequences is uncertain or contradictory. The confusion wrought by the vagueness of the *Whitner* decision is enormously troubling for

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[16] These drugs may cause fetal respiratory depression, hypotension, paralytic ileus, bradycardia, hypoglycemia, and varying degrees of intrauterine growth retardation. *Id.* at 1861.

[17] *Id.* at 1859; *see also* L.J. Van Marter *et al., Persistent Pulmonary Hypertension of the Newborn and Smoking and Aspirin and Nonsteroidal Antiinflammatory Drug Consumption During Pregnancy*, 97 Pediatrics 658 (1996) (maternal consumption of aspirin during pregnancy found to be consistently associated with pulmonary hypertension of the newborn, an important cause of respiratory failure in neonates).

[18] N.S. Gustavsson & A.E. MacEachron, *Criminalizing Women's Behavior*, 27 J. of Drug Issues 673, 675-76 (1997).

[19] *See, e.g.*, J.A. Doane, *Family Interaction and Communication Deviance in Disturbed and Normal Families: A Review of Research, in Advances in Family Psychiatry – Vol. II* 113 (J.G. Howells ed., 1980).

a wide variety of health care and social services professionals. This confusion becomes intolerable when compounded by the criminal sanctions, including imprisonment, that befall those professionals who fail first to divine and then to comply with the state's reporting requirement.[20]

B. THE PETITION SHOULD BE GRANTED TO AVERT WIDESPREAD AND SERIOUS HARM TO PREGNANT WOMEN.

By expanding South Carolina's child abuse reporting requirement to include cocaine use by pregnant women, the *Whitner* opinion compels medical providers to breach patient confidentiality in a particularly critical context. Adequate prenatal care requires patients to provide accurate information to their health care professionals – especially about use of a substance that might pose a risk to the fetus. Yet, under *Whitner*, patients in South Carolina have every incentive to hide critical information since any admission of drug use or other potentially risky activity *must* be reported to state authorities. By casting treatment providers as law enforcement agents, with interests adverse to the patients they are sworn to care for, the *Whitner* decision makes doctors, nurses, substance abuse counselors and other treatment providers accessories to a public health tragedy that is both predictable and preventable.

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[20] As the discussion of confidentiality in the next section underscores, the *Whitner* decision also places treatment providers in a double bind by pitting fetal health against maternal well-being, forcing providers to choose which patient to treat. In light of *Whitner*, South Carolina physicians might feel legally constrained from recommending or prescribing therapies to their pregnant patients that could, but might not, result in fetal harm – be it chemotherapy or radiation treatment for cancer, or even the administration of drugs commonly used during labor and delivery which can themselves cause fetal central nervous system depression, anoxia, hypothermia, low Apgar scores, impaired metabolic responses, and neurological depression. *Merck Manual* at 1861.

An environment of communication and trust is crucial for preventing or reducing harm to drug-exposed infants. Maintaining the confidentiality of the identities and communications of pregnant patients can decrease the harm to women and their children in several ways. First, drug use is one of the most commonly missed diagnoses in obstetric and pediatric medicine[21]: in most cases, a patient's drug use is not apparent if the patient does not disclose it. Thus, important medical benefits can accrue when a treatment provider can permit the patient to feel sufficiently comfortable to divulge highly personal, often stigmatizing, sometimes incriminating information.[22] Even if the pregnant patient does not discontinue her drug use, the negative health effects associated with prenatal drug exposure can be significantly reduced through adequate prenatal care and counseling if the patient embraces the therapeutic relationship.[23] Second, open communication with physicians regarding drug use is necessary to insure safe deliveries.[24] Third, adequate parenting skills and a supportive environment may compensate for prenatal risk factors created

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[21] I. Chasnoff, *Drug Use in Pregnancy: Parameters of Risk*, 35 The Pediatric Clinics of North Am. 1043, 1410 (1988).

[22] *See* R. Arnold *et al.*, *Medical Ethics and Doctor/Patient Communication, in The Medical Interview: Clinical Care, Education and Research* 345 (M. Lipkin, Jr. *et al.* eds., 1995); A. Lazare, *Shame, Humiliation, and Stigma in the Medical Interview, in id.* at 333.

[23] *See, e.g.*, A. Racine *et al.*, *The Ass'n Between Prenatal Care and Birth Weight Among Women Exposed to Cocaine in New York City*, 270 JAMA 1581, 1585-86 (1993).

[24] Patients using cocaine "may have untoward responses to anesthesia," yet identification of such patients prior to the initiation of anesthesia "has proven difficult," as many of these patients deny illicit drug use. D.J. Birnbach *et al.*, *Cocaine Screening of Parturients Without Prenatal Care: An Evaluation of a Rapid Screening Assay*, 84 Anesthesia Analg. 76 (1997). *See also* D. Campbell *et al.*, *Unrecognized "Crack" Cocaine Abuse in Pregnancy*, 77 British J. Anaesthesiology 553, 555 (1996) (Eliciting information from obstetric patients about cocaine use is important because the "interaction of cocaine with other local anaesthetics makes the calculation of a safe maximum dose difficult.").

by prenatal drug exposure.[25] These skills and this environment, in turn, can be cultivated through a positive alliance with health care providers. In short, a climate of confidentiality is essential if patients are to disclose drug use and/or seek continued care and counseling from health professionals in order to reduce the potential harms caused by substance use during pregnancy.

For competent care of any patient, it is undisputed that patient confidentiality must be jealously guarded:

> To make diagnoses and treat patients effectively, the physician must obtain sensitive information about a patient. A patient must be willing to tell a physician, who is often a total stranger, about such matters as drug usage . . . and to allow the physician to examine intimate parts of his or her anatomy. The promise of confidentiality encourages patients to disclose sensitive subjects to a physician without fear that an embarrassing condition will be revealed to unauthorized people. Violation of confidentiality also shows disrespect to the patient as a human being. . . . [26]

The usual importance of patient confidentiality becomes all the more critical in the context of substance abuse treatment:

> It is quite clear that part of treating [a chemically dependent person] as a patient includes embracing all of the appropriate ethical constraints of health care delivery. . . . Possibly at the top of the list of ethical issues that are of very special and fundamental importance to this group of patients is the appropriate maintenance of confidentiality.[27]

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[25] *See, e.g.*, Finnegan & Kandall, *supra* note 8, at 523.

[26] Arnold *et al.*, *supra* note 22, at 365 (citation omitted).

[27] M.J. Kreek & M. Reisinger, *The Addict as a Patient, in Comprehensive Textbook* 822, 830; *see also* R. Elk *et al.*, *Behavioral Interventions: Effective and Adaptable for the Treatment of Pregnant Cocaine-Dependent Women*, 27 J. of Drug Issues 625, 630, 632 (1997)

The decision below now directly undermines the ethical obligations, professional training, and standard of practice applicable to physicians and other health care providers.[28] Indeed, the *Whitner* decision forces treatment professionals into a painful and cruel dilemma – whether to breach the patient confidentiality so essential to medical care and drug treatment services, or violate state law and be subject to imprisonment. This conflict presents an untenable situation for South Carolina's health care providers who seek to adhere to the basic tenets of medical practice while providing quality care for their patients. Quality care in conformity with ethical standards forbids any treatment provider from violating the creed that is as old as the medical profession itself: Above all else a healer must do no harm.

("[C]onfidentiality must be rigidly adhered to and a trust in the staff established" to attract to and retain in treatment pregnant drug-dependent women.); National Council on Alcoholism and Drug Dep., Policy Statement, *Women, Alcohol, Other Drugs and Pregnancy* 5 (1990) ("States should resist efforts to weaken confidentiality protections for pregnant alcoholic and other drug-dependent women seeking prenatal care or alcoholism and/or drug treatment services.").

[28] The decision below may also require some providers to act in conflict with federal law. Title 42 U.S.C. § 290dd-2 (also known as the Federal Drug Treatment Confidentiality Statute) prohibits federally assisted drug-abuse treatment programs from divulging patient identities and records. Although this confidentiality provision "do[es] not apply to the reporting under State law of incidents of suspected child abuse and neglect," *id.* 290dd-2(e)(2), it is not at all clear whether the South Carolina Supreme Court's expansion of the term "child abuse" to cover maternal prenatal actions falls within the narrow exception envisioned and intended by Congress. This legal uncertainty, and the demands of seemingly conflicting legal mandates, further exacerbates the confusion, fear and frustration faced by South Carolina's physicians and other health care professionals.

One of the most effective weapons against infant mortality is early, high-quality, comprehensive prenatal care.[29] Prenatal care improves pregnancy outcomes even among women with addictions: pregnant women who use cocaine but who have at least four prenatal care visits significantly reduce their chances of delivering low birth weight babies.[30] For this reason, public health organizations at the national, regional and state levels counsel against imposing criminal sanctions on pregnant women with addictions. The Board of Trustees of the American Medical Association addressing this very issue concluded that if the criminal justice system is used to deal with drug-abusing mothers,

> [p]regnant women will be likely to avoid seeking prenatal or other medical care for fear that their physicians' knowledge of substance abuse or other potentially harmful behavior could result in a jail sentence rather than proper medical treatment."[31]

The Southern Regional Project on Infant Mortality echoes this warning. The Project, an initiative of the Southern Governors' Association and the Southern Legislative Conference, undertook a comprehensive three-year study of perinatal substance abuse in southern states, including South Carolina. Topping the list of the study's conclusions and recommendations, the Conference urges: "Emphasize prevention and treatment

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[29] Southern Regional Project on Infant Mortality, *A Step Toward Recovery: Improving Access to Substance Abuse Treatment for Pregnant and Parenting Women* 6 (1993).

[30] Racine, *supra* note 23, at 1585, 1586.

[31] American Medical Ass'n, *Legal Intervention During Pregnancy*, 264 JAMA 2663, 2667 (1990). The AMA accordingly resolved that "[c]riminal sanctions or civil liability for harmful behavior by the pregnant woman toward her fetus are inappropriate." *Id.* at 2670. It is not mere speculation that the threat of criminal prosecution deters pregnant drug users from seeking both drug treatment and prenatal care: multiple studies have shown as much. *See, e.g.*, S.R. Kandall, *Substance and Shadow: Women and Addiction in the United States* 278-79 (1996); *see also* GAO, *ADMS Block Grant: Women's Set Aside Does Not Assure Drug Treatment for Pregnant Women* 5, 20 (1991).

rather than punitive measures." Specifically, the Conference found:

> It is clear from these findings that fear of losing children is a major reason women delay or avoid seeking treatment. If pregnant women . . . feel that they will be "turned in" by health care providers or substance abuse treatment centers, they will avoid getting care. If women are able to discuss their addiction with providers without fear of retribution . . . they are more likely to enter treatment. Attempts to impose criminal penalties for alcohol or drug use during pregnancy exacerbate women's fears and make it less likely they will seek or receive the care they need for either their pregnancies or their addiction.[32]

The American Society of Addiction Medicine concurs, declaring that

> [t]he imposition of criminal penalties solely because a person suffers from an illness is inappropriate and counterproductive. Criminal prosecution of chemically dependent women will have the overall result of deterring such women from seeking both prenatal care and chemical dependency treatment, thereby increasing, rather than

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[32] Southern Regional Project on Infant Mortality, *A Step Toward Recovery: Improving Access to Substance Abuse Treatment for Pregnant and Parenting Women* 21 (1993); *accord* Southern Legis. Summit on Healthy Infants and Families, Policy Statement 8 (1990) ("[S]tates should adopt, as preferred methods, prevention, intervention, and treatment alternatives rather than punitive actions to ameliorate the problems related to perinatal exposure to drugs and alcohol."); Georgia General Assembly's Joint Conference on Children of Cocaine and Substance Abuse (Nov. 1, 1990) (recommending that the state treat cocaine-using pregnant women and declare a moratorium on legislation seeking to prosecute drug-dependent pregnant women).

> preventing, harm to children and to society as a whole.[33]

The National Association for Perinatal Addiction Research and Education similarly warns that

> criminalization of prenatal drug use . . . will deter women who use drugs during pregnancy from seeking the prenatal care which is important for the delivery of a healthy baby.
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> * * *
>
> The prospect of criminal prosecutions . . . also places health care practitioners in a conflict position, forcing them to choose between maintaining their patient's [sic] confidentiality or reporting them, ultimately to the police, a position many doctors and nurses find intolerable.
>
> * * *
>
> [These women] do not want or intend to hurt their unborn children by using drugs. But, they need help, not threats, to overcome their problems.
>
> * * *
>
> The key to intervention will be access to health care for high risk women, not the threat of criminal prosecution.[34]

Even the United States General Accounting Office found that "the threat of prosecution poses . . . [a] barrier to treatment for pregnant women. . . . These women are reluctant to seek treatment if there is a possibility of punishment. . . . [W]omen in need of treatment are well aware of the threat [of child abuse prosecutions].[35] In fact, every leading public health and

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[33] American Soc'y of Addiction Med., Bd. of Directors, *Public Policy Statement on Chemically Dependent Women and Pregnancy* (Sept. 25, 1989).

[34] National Ass'n for Perinatal Addiction Research and Educ., Policy Statement No. 1, *Criminalization of Prenatal Drug Use: Punitive Measures Will Be Counter-Productive* (1990).

[35] GAO, *supra* note 31, at 20.

medical organization to have considered the subject has rejected the criminalization of drug use during pregnancy.[36]

It appears that the fears of these organizations are being borne out. Drug treatment providers in South Carolina already have reported a marked decrease in the number of pregnant

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[36] *See, e.g.*, National Council on Alcoholism and Drug Dependence, *Women, Alcohol, Other Drugs and Pregnancy* (1990) (A "punitive approach is fundamentally unfair to women suffering from addictive diseases and serves to drive them away from seeking both prenatal care and treatment for their alcoholism and other drug addictions. It thus works against the best interests of infants and children. . . . "); American College of Obstetricians and Gynecologists ("ACOG") Committee Opinion 55 (Oct. 1987) (resort to the courts "is almost never justified" in treating pregnant women); ACOG Technical Bulletin 195, *Substance Abuse in Pregnancy* 1 (1994) ("In some states, the legal requirements regarding reporting substance abuse threaten to interfere with patient confidentiality and the entire physician-patient relationship."); American Academy of Pediatrics, Comm. on Substance Abuse, *Drug-Exposed Infants*, 86 Pediatrics 639, 642 (1990) ("The public must be assured of nonpunitive access to comprehensive care which will meet the needs of the substance-abusing pregnant woman and her infant."); American Nurses Ass'n, *Position Statement* (Apr. 5, 1992) ("ANA . . . opposes any legislation that focuses on the criminal punishment of the mothers of drug-exposed infants. . . . The threat of criminal prosecution is counterproductive in that it prevents many women from seeking prenatal care and treatment for their alcohol and other drug problems."); California Medical Ass'n, Policy Position ("[T]o bring criminal charges against a pregnant woman for activities which may be harmful to her fetus is inappropriate. Such prosecution is counterproductive to the public interest as it may discourage a woman from seeking prenatal care or dissuade her from providing accurate information to health care providers out of fear of self-incrimination.") *quoted in* American Medical Ass'n, *Legal Intervention During Pregnancy: Court-Ordered Medical Treatment and Legal Penalties for Potentially Harmful Behavior by Pregnant Women*, 264 JAMA 2663, 2669 (1990); *see also, State v. Luster*, 419 S.E.2d 32, 35 n.2 (Ga. 1992) (listing medical and public health organizations opposing the prosecution of women for cocaine use during pregnancy); M.L. Poland *et al., Punishing Pregnant Drug Users: Enhancing the Flight From Care*, 31 Drug and Alcohol Dependence 199 (1993).

women with substance use problems seeking treatment and prenatal care in the wake of *Whitner*. *See* Part I, *supra*.

IV.

CONCLUSION

Whitner saddles health professionals with an ethical dilemma. It also poses a very real threat to the health and well-being of untold numbers of women and their families by driving pregnant women with health problems away from urgently needed medical, substance abuse, counseling, prenatal, and other necessary care. In short, *Whitner* threatens the integrity of medical practice and endangers the lives of women.

For the foregoing reasons, *amici curiae* respectfully request this Honorable Court to grant the petition for *certiorari*.

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APPENDIX

Amicus Curiae National Association of Alcoholism and Drug Abuse Counselors ("NAADAC") is the largest national organization of alcohol and drug counselors, with 17,000 members. Founded in 1972, NAADAC is committed to increasing general awareness regarding the problems associated with alcoholism and substance abuse and to enhancing the care of individual patients through treatment, public education, and outreach programs aimed at prevention. As an organization that certifies alcoholism and drug abuse counselors, NAADAC promotes and monitors adherence to ethical standards throughout the nation. NAADAC promotes quality treatment services for addicted individuals as the cornerstone of an effective national substance abuse policy. To be effective, however, alcohol and drug treatment requires the trust of the patient, a basic building block of which is the assurance of patient confidentiality. Under the ethical guidelines promulgated by NAADAC for its members, alcohol and drug treatment counselors are required to protect patients' confidences. NAADAC Code of Ethics, Principle 8(a). However, South Carolina alcohol and drug counselors now risk arrest if they fail to report any conduct that may endanger a fetus. The counselors do not know which actions or omissions of their pregnant clients trigger the newly expanded reporting requirements, as the legislature has never enacted a law addressing fetal abuse. The patients also face arrest and prosecution if their treatment provider discloses their identities to authorities. NAADAC is deeply concerned that the confusion and fear that the *Whitner* decision is causing will undermine the provision and quality of care administered

by South Carolina substance abuse professionals to pregnant patients, and the willingness of women to seek these essential services.

Amicus Curiae South Carolina Association of Alcoholism and Drug Abuse Counselors ("SCAADAC") is the South Carolina state affiliate of NAADAC. Founded in 1988, SCAADAC currently has 495 members. Members of SCAADAC are employed as alcohol and drug counselors throughout the state in both the public and private sectors. SCAADAC members have reason to believe that pregnant women who require alcohol and/or drug treatment are being deterred from seeking treatment for fear of prosecution in the wake of the *Whitner* decision. Since the highly publicized prosecution of Cornelia Whitner and the South Carolina Supreme Court's July 15, 1996, decision upholding her conviction and sentence, at least two treatment programs in the Columbia area that give priority to pregnant women have already experienced precipitous drops in admissions for pregnant women. The Women's Community Residence is a 24-bed halfway house for women substance abusers. The facility accepts applications from an average of 237 women per year, admitting approximately 133 women. The facility's admission records show that admissions of pregnant women fell 80% (from 10% to 2% of the total number of women treated at the facility) between July 1, 1996 and June 30, 1997. The Women's Intensive Outpatient program is an intensive day program which additionally provides child care. It treats an average of 95 women per year. During approximately the same period, admissions of pregnant women to this program declined 54% (from 13% to 6% of the total number of women treated at the

facility). In light of these and other observations, SCAADAC is deeply concerned that pregnant women who require alcohol and/or drug treatment are being deterred from seeking treatment for fear of prosecution. SCAADAC also shares the concerns of NAADAC regarding the serious legal and ethical dilemmas facing its membership as a result of the *Witner* decision below.

Amicus Curiae American College of Obstetricians and Gynecologists ("ACOG"), founded in 1951, is a private, voluntary, not-for-profit organization of physicians who specialize in obstetric and gynecologic care. The leading group of professionals providing health care to women, ACOG's more than 38,000 members represent over 90 percent of all obstetricians and gynecologists currently practicing in the United States. One of ACOG's many purposes is to educate health care professionals, law and policy makers and the general public about all aspects of women's health care. ACOG undertakes to assure that all women have access to prenatal care and to promote a healthy pregnancy for the benefit of both the fetus and the mother. ACOG is concerned that the threat of prosecution will drive pregnant women away from seeking care at a time when information and treatment could significantly improve maternal health and increase the chances of delivering a healthy baby.

Amicus Curiae National Association of Social Workers, Inc. ("NASW") is the world's largest association of professional social workers with over 155,000 members in fifty-five chapters throughout the United States and abroad. Founded in 1955 from a merger of seven predecessor social work organizations, NASW is devoted to promoting the quality and effectiveness of social work

practice, advancing the knowledge base of the social work profession, and improving the quality of life through utilization of social work knowledge and skills. The South Carolina chapter of NASW has over 1,260 members. NASW and its South Carolina chapter believe that criminal prosecution of women who use drugs during their pregnancy is inimical to family stability and counter to the best interests of the child. The needs of society are better served by treatment of addiction, not punishment of the addict.

Amicus Curiae American Nurses Association ("ANA") is a professional organization representing this nation's over 2.2 million registered nurses. ANA is committed to ensuring the availability and accessibility of health care services. It believes that access to maternal-child health services is particularly critical to efforts to prevent disease and to provide early intervention for health care problems. Thus it opposes all barriers to prenatal care. ANA believes that the threat of criminal prosecution is a significant deterrent for substance-using pregnant women in need of prenatal care and treatment. Such a threat serves no one and only endangers the health of both mother and child.

Amicus Curiae South Carolina Nurses Association ("SCNA"), a constituent member of ANA, is a professional organization which represents registered nurses in South Carolina. SCNA's legislative positions speak strongly to support of health care for a number of vulnerable populations and to the reproductive rights of women. One of these rights must be to be able to seek prenatal health care secure in the knowledge that the health care providers are care givers and not threats to

the person seeking care. In 1991, SCNA issued a position statement opposing the criminal prosecution of women for drug use while pregnant. SCNA continues to believe that the threat of criminal prosecution serves as a real deterrent to pregnant women who suffer from addictions disease from seeking and obtaining prenatal care.

Amicus Curiae American Medical Women's Association ("AMWA") is a national, non-profit organization of over 10,000 women physicians and physicians-in-training representing every medical specialty. Founded in 1915, AMWA is dedicated to promoting women in medicine and advocating for improved women's health policy. AMWA strongly supports treatment and rehabilitation of women who use alcohol and drugs during pregnancy, and opposes the prosecution of pregnant women as a method for preventing or punishing chemical dependency during pregnancy. AMWA encourages all pregnant women to seek prenatal care and believes that punishment for drug abuse will deter women, especially those that may be at high risk for adverse pregnancy outcomes, from receiving prenatal care. Furthermore, the physicians of AMWA highly value the patient-physician relationship and are concerned that the threat of prosecution will erode this relationship.

Amicus Curiae National Association for Families and Addiction Research and Education ("NAFARE") is a not-for-profit partnership of health care, social science and child advocate professionals, attorneys, judges, educators and administrators that provides education and leadership in the development of multidisciplinary programs for preventing and treating alcohol, tobacco and other drug use in order to enhance the outcome for women,

their children, and their families. NAFARE has more than 1,000 members and 8,000 supporting members nationally. NAFARE's mission is to develop, synthesize and disseminate research-based information to professionals working with children and families affected by addiction. A particular focus of NAFARE's research and work addresses the issues faced by pregnant substance-using women and the long-term outlook for children who have been exposed *in utero* to licit and illicit drugs. Ira J. Chasnoff, M.D., President and Medical Director of NAFARE, is renown for his research into the effects of alcohol, cocaine and other drugs on pregnancy and infant outcome.

Amicus Curiae Association for Medical Education and Research in Substance Abuse ("AMERSA") is a national organization of three hundred health care and social services professionals. AMERSA is committed to educating physicians, nurses, social workers, and other health care and social services professionals on the recognition and treatment of alcohol and drug problems. Many of AMERSA's members are psychiatrists, nurses, and social workers who specialize in substance abuse treatment; others are internists, family physicians, pediatricians, nurses, and social workers who work in general health and social services settings identifying individuals with alcohol and drug problems, providing counseling, and referring them as necessary to treatment specialists; most members are professors at medical schools, nursing schools, or social work programs. To be effective, prenatal care and treatment for pregnant addicts must occur in the context of a confidential, respectful, and trusting relationship between professional and patient. AMERSA believes

that a requirement to report pregnant addicts to authorities would produce net harm to the health of mothers and children by deterring such addicts and their families from obtaining prenatal care, addictions treatment, and counseling.

Amicus Curiae American Academy on Physician and Patient ("AAPP") is devoted to improving public health through research and education about the doctor-patient relationship, which lies at the core of effective health care. Since its founding in 1979, AAPP has developed, evaluated, and promulgated the leading model of medical education regarding the physician-patient relationship, and has trained over 3,000 physicians. The AAPP has shown that the therapeutic relationship between physician and patient depends on the assurance of confidentiality and physicians' unfettered ability to counsel and care for their patients. The AAPP, with a membership of more than 550 physicians from 10 countries, is devoted to strengthening the physician-patient relationship, and hence the quality of patient care, by promoting collaborative relationships between doctors and patients. The strength of the therapeutic relationship, in turn, affects the patient's willingness and ability to follow through with the treatment and the patient's response to the treatment. To compromise the doctor-patient relationship is to compromise care, and thereby to damage health, increase suffering, escalate medical costs, and decrease life expectancy. The AAPP believes that the *Whitner* decision, by rewriting South Carolina's reporting law to include fetal abuse, strikes at the core of the physician-patient bond, undermining the trust and confidence essential to the

critical relationship between health care professionals and their pregnant patients.

Amicus Curiae Society of General Internal Medicine ("SGIM") is the professional society of academic physicians who teach and conduct research in the field of general internal medicine. The Society, which has 2700 members in the United States (including South Carolina) and 11 other countries and which publishes the Journal of General Internal Medicine, is a leader in research and education in the care of adults. Many of SGIM's members have national expertise in research and teaching about alcoholism and other substance abuse. SGIM is deeply concerned that the *Whitner* decision will deprive addicted women in South Carolina of essential medical care – with grave consequences for the gestation, delivery and health of their offspring – by virtue of the chilling effect the decision will have on the ability and willingness of physicians to provide unfettered treatment to pregnant patients, and on the willingness of pregnant women to seek prenatal care and substance abuse services.

Amicus Curiae National Council on Alcoholism and Drug Dependence, Inc., ("NCADD"), with its nationwide network of affiliates, provides education, information, help and hope in the fight against the chronic diseases of alcoholism and other drug addictions. Founded in 1944, NCADD historically has provided confidential assessment and referral services for alcoholics and other drug addicts seeking treatment. If NCADD affiliates were forced to provide the names of drug-using pregnant women to law enforcement authorities, it would greatly inhibit their ability to serve this population. In 1990, the NCADD Board of Directors adopted a policy statement

on "Women, Alcohol, Other Drugs and Pregnancy" that recommended that "[s]tates should avoid measures which would define alcohol and other drug use during pregnancy as prenatal child abuse and should avoid prosecutions, jailing or other punitive measures which would serve to discourage women from seeking health care services. . . . " For these reasons, NCADD opposes the *Whitner* decision below.

Amicus Curiae National Center for Youth Law ("NCYL"), founded in 1970, is a San Francisco-based nonprofit organization that works on legal and policy issues affecting poor children and youth nationwide. NCYL provides technical assistance and training, produces publications, and co-counsels major cases in the areas of health care, child welfare, public benefits, child support, and housing discrimination. NCYL has worked extensively on legal issues affecting drug-exposed infants, and in 1990 and 1995 published special issues of its journal, *Youth Law News*, on these topics. NCYL believes that the goal of child abuse reporting laws is to identify children who have been abused or neglected so that the state can intervene for their benefit. A system of mandatory child abuse reporting as envisioned by the *Whitner* decision not only has the potential for driving pregnant women away from prenatal care, but also risks wasting scarce child welfare resources and diverting attention from cases in which children who are at significant risk or have actually suffered abuse or neglect need assistance and protection.

Amicus Curiae Legal Services for Prisoners with Children ("LSPC") is a legal advocacy organization which has

represented incarcerated parents, their children and family members for over 20 years. LSPC staff have been lead counsel or co-counsel on four class action lawsuits which have successfully challenged seriously deficient medical care conditions for women prisoners, including pregnant, substance-dependent women incarcerated in California state prisons and county jails. The organization has represented many hundreds of pregnant women prisoners and pregnant, substance-dependent women who have been subjected to inadequate medical care during their pregnancies, leading in many cases to infant deaths, late-term miscarriages and serious pregnancy complications. LSPC staff have spoken nationally and written extensively on issues affecting pregnant women prisoners, urging policy reform which takes into account the actual consequences of subjecting pregnant, substance-dependent women to inadequate medical care while incarcerated.

Amicus Curiae Coalition on Addiction, Pregnancy and Parenting ("CAPP") is a non-profit organization committed to the development of a continuum of comprehensive services for alcohol- and drug-dependent women and their families throughout Massachusetts. CAPP is committed to establishing collaborative models of service delivery and fostering family-centered services. CAPP firmly believes that addiction is an illness requiring treatment, not a crime requiring punishment. CAPP members know firsthand the fears pregnant substance abusing women have regarding prosecution and loss of child custody, causing them to be reluctant to seek prenatal care and substance abuse treatment. Prosecution of pregnant women only serves to keep women out of treatment,

thereby endangering the health and well-being of more women and children.

Amicus Curiae NOW Legal Defense and Education Fund (NOW LDEF) is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and to secure equal rights. NOW LDEF was founded as an independent organization in 1970 by leaders of the National Organization for Women. A major focus of NOW LDEF's work is to oppose gender discrimination and promote reproductive health. Prosecuting women who give birth while addicted to alcohol or drugs hurts both women and children, for it will only deter women from seeking treatment for their addictions.

Amicus Curiae Legal Action Center is a non-profit organization with offices in New York City and Washington, D.C., specializing in legal issues of concern to alcohol, drug and AIDS prevention/treatment communities. The Legal Action Center plays a major role in the policy debate and policy formulation on issues affecting women with alcohol and drug problems and their families, working to enact public policies which promote increased access to care for them. The Legal Action Center also provides legal representation to individuals who have faced discrimination because of their alcohol and drug dependencies. This petition raises issues of great importance to the Legal Action Center and the individuals and treatment programs it represents.

Amicus Curiae Women's Law Project is a non-profit legal advocacy organization in Pennsylvania. The Law

Project works to advance the legal and economic status of women and their families through public policy development, education, one-on-one counseling, and litigation. Throughout the past twenty-four years, the Law Project has played a leading role in the struggle to eliminate discrimination against women based on pregnancy and reproductive capacity. The Women's Law Project has represented *amici curiae* in a number of recent cases involving the improper application of state criminal child abuse and drug delivery statutes to pregnant women and new mothers who have given birth while suffering from an addiction to drugs or alcohol. The Women's Law Project believes that it is both unjust and counterproductive to impose criminal sanctions on pregnant women with untreated addictions.

Amicus Curiae Drug Policy Foundation is a privately funded, tax-exempt, non-profit organization which provides a forum for the development of effective drug policies. The Foundation was established in 1987 and is made up of thousands of individuals from a variety of professions involved with drug issues throughout the United States and around the world. Among the Foundation's advisory board members are individuals who have been leading officials in federal, state and local drug law enforcement agencies, as well as eminent researchers and physicians in the field of drug use. The Foundation is concerned that the *Whitner* decision below will do more harm than good by discouraging pregnant women from seeking prenatal care due to fear of prosecution. The resources spent on such counterproductive criminal law

efforts could be better spent on increasing access to prenatal care and drug treatment for pregnant addicted women.

Amicus Curiae Alliance for South Carolina's Children ("ASCC") is a private, nonprofit, statewide advocacy group whose mission is to build coalitions, develop programs, bring about community based solutions, and lead citizens to action on behalf of children independent of politics and bureaucratic agendas. Founded in 1992, the Alliance is committed to preventive programs and early interventions, which reduce suffering and save tax dollars. ASCC also works for solutions to problems, which strengthen the ability of families to respond to their own children's needs. If left to stand, the *Whitner* decision below will harm children and their families.